California Homeowner Bill of Rights COLLABORATIVE

National Housing Law Project
Western Center on Law & Poverty
National Consumer Law Center
Tenants Together

December 2014 Newsletter

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NCLC's article outlining the CFPB rule requiring servicers to provide borrowers with mortgage payoff statements.

Recent case updates including summaries of *Mendoza*, *Rahbarian*, and *In re* Rivera.

Announcement—

HBOR Collaborative member NCLC will be hosting a webinar **January 13, 2015** on using bankruptcy to save homes from foreclosure. Please see the HBOR Collaborative's training calendar for details and to sign up!

New Rule on Duty to Provide Timely Mortgage Payoff Statements[1]

An amendment to the Truth in Lending Act made by the Dodd-Frank Act requires that accurate payoff statements be provided to consumers.[2] Regulations implementing this amendment issued by the Consumer Financial Protection Bureau (CFPB) became effective on January 10, 2014. For any loan secured by the consumer's dwelling, the creditor, assignee or servicer,[3] as applicable, must provide an accurate statement of the total outstanding balance required to pay the obligation in full if a request is made in writing by the consumer or

[1] This article was authored by John Rao for the National Consumer Law Center's *eReports* service. Printed here with permission of the author and NCLC. *Copyright 2014 National Consumer Law Center, Inc. All rights reserved*. This piece concludes the HBOR Collaborative's series of articles on the CFPB mortgage servicing rules, which went into effect in January, 2014.
[2] 15 U.S.C. § 1639g, as amended by Pub. L. No. 111-203, § 1464, 124 Stat. 1376 (July 21, 2010).
[3] "Servicer" has the same meaning as in the regulations promulgated under RESPA. *See* NCLC, *Foreclosures*, § 9.1.4.1 (4th ed. and 2013 Supp.).

This project was made possible by a grant from the Office of the Attorney General of California, from the National Mortgage Fraud Settlement, to assist California consumers.

someone acting on behalf of the consumer.[4] The statement must provide the payoff amount as of a specified date. With limited exceptions discussed below, the payoff statement must be provided within a reasonable time, but no later than seven business days after a creditor, assignee or servicer receives a written request. Payoff statements for high-cost mortgages are treated under a different timeline and must be provided within five business days of receiving a request for such statement.[5]

Broad Coverage of Rule

Coverage of the payoff statement rule is significantly broader than the other 2014 RESPA and TILA Servicing Rules. The language of the Dodd-Frank Act amendment makes the payoff statement requirement applicable to all "home loans," a term not defined by the Act, and that is presumably broader than "residential mortgage loans."[6] The final regulation implements the statutory language by providing that the requirement applies to any consumer credit transaction secured by a "consumer's dwelling."[7] Thus, the rule applies even to open-end, home-secured loans such as HELOCs. By not limiting application to mortgage loans on the consumer's principal dwelling, the rule also covers loans secured by vacation homes.

Request by Agent

The written request for a payoff statement may be sent by a person acting on behalf of the consumer. The Commentary to Regulation Z notes that a person acting on behalf of the consumer may include the consumer's representative, such as an attorney, a non-profit consumer counseling or similar organization, or a creditor with which the consumer is refinancing and which requires a payoff statement to complete the refinancing.[8] However, the Commentary further indicates that a creditor, assignee or servicer can take

[4] 12 C.F. R. § 1026.36(c)(3) (effective Jan. 10, 2014).
[5] 15 U.S.C. § 1639; 78 Fed. Reg. 6966 (Jan. 31, 2013) (effective Jan. 10, 2014).
[6] *See* 15 U.S.C. § 1602(cc)(5), as amended by Dodd-Frank (defining "residential mortgage loan" to exclude open-end, home-secured credit).
[7] 12 C.F. R. § 1026.36(c)(3) (effective Jan. 10, 2014).
[8] Official Interpretations, 12 C.F.R. § 1026.36(c)(3)-1.

"reasonable measures" to verify the identity of the consumer's agent or representative and that the seven-day response period does not begin until a request is received from a "verified party."[9] Thus, if a creditor, assignee or servicer must verify authorization that a third party is acting on behalf of the consumer, it will have seven business days from when a verified request is received to provide the payoff statement. A verified request sent by a borrower's attorney or other representative typically will include an authorization signed by the borrower.

Comparison with Previous Rule

Prior to January 10, 2014, servicers were required to provide payoff statements pursuant to an amendment to Regulation Z made by the CFPB's predecessor, the Federal Reserve Board, that became effective on October 1, 2009. Servicers had to provide an accurate statement of the amount necessary to pay off an account in full after receiving a request from the consumer or the consumer's agent.[10] Under most circumstances the payoff statement had to be provided within five business days of receipt of the consumer's request.[11] Unlike the CFPB's final rule, this type of consumer request did not have to be in writing. In addition, the requirement applied only to servicers, whereas the obligation to comply with the CFPB's final rule applies to the creditor, assignee or servicer of the loan, as applicable.

Limits on Duty

The Commentary to Regulation Z states that a creditor, assignee or servicer may specify reasonable requirements that a consumer must follow in making payoff requests.[12] For example, a creditor, assignee or servicer can require that requests be directed to a mailing address, email address, or fax number specified by the creditor, assignee or servicer, or can impose any other reasonable requirement or method.

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[9] *Id*; *see also* 78 Fed. Reg. 10,957 (Feb. 14, 2013).
[10] 12 C.F.R. 1026.36(c)(1)(iii); 73 Fed. Reg. 44,522, 44,604 (July 30, 2008); *see also* NCLC, *Truth In Lending*, § 9.4.3 (8th ed. 2012). The FRB's rule was issued under its authority to prohibit unfair and deceptive acts and practices in connection with mortgage loans.
[11] Official Interpretations, 12 C.F.R. § 1026.36(c)(1)(iii)-1.
[12] Official Interpretations, 12 C.F.R. § 1026.36(c)(3)-2.

If the consumer does not follow these requirements, the Commentary indicates that a longer timeframe for responding to the request would be reasonable. This suggests that a request that is not sent to a designated address or does not follow reasonable requirements, but is otherwise received by the creditor, assignee or servicer, is nevertheless a valid payoff request that must be complied with, though over a longer time period.

Numerous industry commenters stated that they needed more than seven days to provide payoff statements for loans in delinquency status, foreclosure, or bankruptcy. The CFPB refused to create a blanket exemption but agreed that it may not be feasible in some situations for servicers to prepare the statement within seven days.[13] The final rule thus provides that when a servicer is unable to provide a payoff statement within seven days because a loan is in bankruptcy or foreclosure, or because the loan is a reverse mortgage or shared appreciation mortgage, or because of natural disasters or similar circumstances, the payoff statement must be provided within a reasonable time.[14] No definition of "reasonable time" is provided.

The final rule also provides that a creditor or assignee that does not currently own the mortgage or the mortgage servicing rights for the loan is not subject to the requirement to provide a payoff statement.[15]

Unlike many other servicing requirements, the CFPB did not include in the final rule an exemption for community banks, credit unions, and small servicers. The CFPB noted that small servicers have not had difficulty in complying with the FRB's existing rule, and no compelling justification was put forth during the rulemaking proceeding to warrant an exclusion.[16]

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[13] *See* 78 Fed. Reg. 10,957 (Feb. 14, 2013).
[14] 12 C.F.R. § 1026.36(c)(3)(effective Jan. 10, 2014).
[15] *Id.*
[16] *See* 78 Fed. Reg. 10,958 (Feb. 14, 2013).

Interaction with RESPA: Right to Dispute Accuracy of Payoff Statement

As of January 10, 2014, the failure to provide an accurate payoff statement based on a TILA request is subject to error resolution under RESPA. If the borrower sends a notice of error disputing the accuracy of a payoff statement, the servicer must respond within seven business days, rather than the longer thirty-day response period for other error notices.[17]

Servicers, however, need not treat a borrower's request for payoff balances as a request for information under RESPA.[18] If a servicer receives a request for information seeking a payoff statement that is labeled as a RESPA request, the servicer may ignore the requirements under Regulation X and instead handle the request under the Regulation Z requirements. One effect of this treatment is that there is no prohibition under federal law for charging the borrower a fee to provide a payoff statement. If the CFPB had permitted a RESPA request for information to be used to obtain a payoff statement, the rule prohibiting the charging of fees for responding to information requests would have applied.[19]

No Preemption of State Law

Many states have enacted laws dealing with payoff statements. Summaries of these state laws are provided in NCLC's *Foreclosures*, Appendix D.2. In issuing the final rule, the CFPB acknowledged that many of these state laws have longer or shorter timelines for compliance, allowing from three to twenty-one days.[20] Consistent with general preemption guidelines in which a conflict analysis is applied, the CFPB concluded that there was no need for the final rule to

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[17] 12 C.F.R. 1024.35(e)(3)(a) (effective Jan. 10, 2014). For a discussion of error notices under RESPA, see NCLC *Foreclosures*, § 9.2.2 (4th ed. and 2013 Supp.).
[18] *See* 12 C.F.R. 1024.36(a) (effective Jan. 10, 2014). Prior to the effective date of these rules, a payoff statement could still be obtained using a qualified written request under RESPA.
[19] *See* 12 C.F. R. § 1024.36(g) (effective Jan. 10, 2014); NCLC, *Foreclosures*, § 9.2.2.7 (4th ed. and 2013 Supp.).
[20] *See* 78 Fed. Reg. 10,957 (Feb. 14, 2013).

preempt these state laws. Regulation Z sets the maximum time period for compliance, but does not prevent creditors, assignees, or servicers from complying with a state law that would require a payoff statement to be provided sooner than seven days. These entities can comply with both the state law and Regulation Z deadlines by providing the payoff statement within the shorter of the two deadlines. State laws that allow a longer time period also do not prohibit the creditor, assignee, or servicer from providing a payoff statement within seven business days, and so there is no direct conflict between state law and the Regulation Z requirement and the shorter seven business day Regulation Z requirement would control.

Although not explicitly addressed by the CFPB, Regulation Z should not preempt the remedy provisions of any applicable state payoff statement law, and the remedies under TILA should not be viewed as exclusive. Thus, if a creditor, assignee, or servicer is required under state law to provide a payoff statement is less than seven business days, and there has been a violation of that state law, the consumer should be able to pursue any applicable remedies available under the state payoff statement statute. If in this example the creditor, assignee, or servicer also fails to provide the statement within seven business days after receipt of the request, then the TILA private remedies additionally should be available to the consumer, including actual and statutory damages, and attorney fees.[21]

[21] 15 U.S.C. § 1640(a). *See also* NCLC, *Foreclosures*, § 9.6.6 (4th ed. and 2013 Supp.).

Summaries of Recent Cases

Published State Cases

Review Granted: Rejection of *Glaski*; Prejudice Required in Wrongful Foreclosure Claims; Defaulting Borrowers Lack Standing to Pursue Robo-Signing Claims

Mendoza v. JP Morgan Chase Bank, N.A., 228 Cal. App. 4th 1020 (2014), *depublished and review granted*, 337 P.3d 493 (Cal. 2014): In general, California borrowers lack standing to allege violations of pooling and servicing agreements (PSAs), contracts between their lender and a third party trust. Here, borrower claims her loan was improperly assigned to a trust (securitized) because servicer attempted the assignment after the trust had already closed, violating the trust's own PSA. The court considered *Glaski v. Bank of Am., N.A.*, 218 Cal. App. 4th 1079 (2013), a recent California Court of Appeal case that *did* grant borrower standing to challenge a foreclosure based on a similar PSA violation and New York trust law. This court disagreed with *Glaski's* standing analysis: "[w]e can find no state or federal cases to support the *Glaski* analysis and will follow the federal lead in rejecting this minority holding." Even if the loan was actually assigned to the trust late, in violation of the PSA, and *even if borrower presented specific evidence demonstrating this violation*, nothing in California's nonjudicial foreclosure statutory framework allows a borrower to challenge a foreclosure based on a "glitch in an attempted securitization." The securitization of borrower's loan —botched or not— "did not deprive the beneficiary of the deed of trust of the legal right to foreclose." Recently, the Supreme Court of California granted review of this case, but pending a decision in *Yvanova v. New Century Mortg.,* 226 Cal. App. 4th 495 (2014), *depublished and review granted*, 331 P.3d 1275 (Cal. 2014).[22]

[22] For a full summary of *Mendoza*, including the wrongful foreclosure/prejudice issue, and the robosining claim, see our Case Compendium.

Federal Cases

Wrongful Foreclosure Analysis Differs in Bankruptcy Context: Debtors May Assert *Glaski*-like Claims to Contest Creditor's Proof of Claim

***In re* Rivera**, 2014 WL 6675693 (B.A.P. 9th Cir. Nov. 24, 2014): In general, California borrowers do not have standing to allege violations of pooling and servicing agreements (PSAs), contracts between their lender and a third party trust. Additionally, they may not bring a suit to force the foreclosing entity to prove it possessed the authority to foreclose, as this would place additional burdens on the foreclosing entity not provided in California's statutory foreclosure framework. Here, the current beneficiary filed a proof of claim in debtors' chapter 13 bankruptcy case, asserting it is a "secured creditor" holding debtor's note and able to foreclose. In turn, debtors brought a claim "to determine the extent and validity of [beneficiary's] lien." Broadly, debtors asserted problems with the endorsement of their note and with the assumption of the note and deed of trust from the original lender to the current beneficiary, along the lines of a *Glaski* claim: the assignment to beneficiary's trust was void, occurring years after the trust's closing date. The bankruptcy court dismissed debtor's complaint, rejecting *Glaski's* logic, determining that the beneficiary need not prove it was the proper holder of debtor's note to bring a valid proof of claim, and holding that debtors lacked standing to attack an assignment to which they were not a party. The Ninth Circuit Bankruptcy Appellate Panel (B.A.P.) disagreed with much of the bankruptcy court's decision. The cases upon which the bankruptcy court relied considered borrowers' affirmative suits to determine if the foreclosing party had authority to foreclose. The B.A.P. read these cases as limited to an affirmative suit context and refused to apply them in a bankruptcy case. Acknowledging that some of debtor's claims "might be construed as a direct attack on foreclosure," the court noted that "other aspects addressed [beneficiary's] proof of claim and its assertions therein that it held a secured claim and was entitled to enforce the note." And, as previously held by the B.A.P., debtors may "object on standing to grounds to a proof of claim based on a note secured by a [DOT]," putting the ball in the beneficiary's court to show that the assignment was proper and that it *is* the entity with the authority to enforce the note, in keeping with basic California contract law. Because beneficiary offered no proof of a valid assignment, its proof of claim failed. The B.A.P. also found that debtors have standing—in a bankruptcy context—to attack an assignment to which they are not a party:

> Even though *Siliga*, *Jenkins* and *Debrunner* may preclude [debtors] from attacking [beneficiary's] foreclosure proceedings by arguing that [servicer's] assignment of the deed of trust was a nullity in light of the absence of a valid transfer of the underlying debt, we know of no law precluding [debtors] from challenging [beneficiary's] assertion of secured status for purposes of [debtors'] bankruptcy case.

Accepting debtors' allegations regarding the sham note endorsement and the improper assignment, the B.A.P. held that debtors' claim *to ascertain beneficiary's rights as a creditor in the bankruptcy* (as opposed to prevent or undo a foreclosure sale) is viable. The B.A.P. reversed and remanded the bankruptcy court's dismissal of debtor's complaint on this point.

Servicer Wrongfully Foreclosed after Borrower Tendered the Amount Due on the NOD

***In re* Takowsky**, 2014 WL 5861379 (B.A.P. 9th Cir. Nov. 12, 2014):[23] Notices of default must specify the "nature of each breach actually known to the [loan] beneficiary," including a statement of how much

[23] The previous iteration of this case is summarized in our Case Compendium as *In re* Takowsky, 2013 WL 5183867 (Bankr. C.D. Cal. Mar. 20, 2013); 2013 WL 5229748 (Bankr. C.D. Cal. July 22, 2013). In the current case, the B.A.P. reviewed and affirmed the bankruptcy court's decision.

the borrower is in default. Whatever the *actual* default amount, the amount listed on the NOD controls. "Recurring obligations," however, do *not* need to be listed in an NOD to still be due in borrower's reinstatement. A "recurring obligation" is limited to "obligations secured by the trust deed involved in the foreclosure." Here, the NOD stated that borrower had breached the deed of trust on her second loan, and listed amounts due accordingly. It made no mention of senior liens. Borrower paid her servicer the amount due on the NOD. "In doing so," the bankruptcy court found, "[borrower] cured the only default explicitly listed in the NOD," and by accepting that payment, servicer was prevented from foreclosing. Borrower's actual default on the senior lien was found irrelevant because that default was not listed on the NOD. Servicer's subsequent foreclosure was determined to be wrongful because servicer had no power of sale under the NOD. On appeal, servicer argued the bankruptcy court erred when it held that servicer could not exercise the power of sale under the NOD. The B.A.P. agreed with the bankruptcy court. The unlisted liens were not "recurring obligations" that could have been omitted from the NOD and yet still required in any reinstatement. The B.A.P. affirmed the bankruptcy court's prior holding.

Improper Escrow Fees Provide Basis for Promissory Estoppel, Good Faith & Fair Dealing Claims; Servicer Failure to Provide Borrowers with Pre-NOD Copy of Note and Accounting of Loan Basis for CC 2923.5 Claim

McNeil v. Wells Fargo Bank, N.A., 2014 WL 6681604 (N.D. Cal. Nov. 25, 2014): Promissory estoppel claims require a clear and unambiguous promise, reasonable and foreseeable reliance, and damages. Here, borrowers entered into a permanent modification with their servicer, agreeing to pay an escrow as part of their reduced monthly mortgage payment, "as defined by the Note" and subject to change. At first, borrowers paid the monthly escrow they were quoted during modification negotiations. Soon after the modification was in place, however, servicer added fees onto borrowers' escrow that were not contemplated in the modification, raising their monthly mortgage payment by $1,000. The court agreed that borrowers had stated a viable promissory estoppel claim under these facts, and denied servicer's MTD.

Every contract contains an implied covenant of good faith and fair dealing, meaning "neither party will do anything that will injure the right of the other to receive the benefits under the contract." Here, borrowers alleged the actual escrow charges were inflated beyond what they agreed to in the modification agreement. The claim survived the MTD.

Generally, CC 2923.55 prevents servicers from initiating foreclosure until contacting, or diligently attempting to contact, a borrower to discuss foreclosure alternatives. Specifically, CC 2923.55(b)(1)(B) prevents servicers from recording an NOD before sending borrower written notice that borrower may request certain documents, including their promissory note, DOT or mortgage, and any applicable assignment. Here, borrowers alleged servicer recorded an NOD, pre-HBOR, and then failed to provide borrowers with a copy of the note, identify the beneficiary of the loan, or identify "any assignment and accounting of the loan." The court was silent on the pre-HBOR nature of this claim, and on the fact that borrowers apparently did not plead that they *actually* requested this information, but because servicer did not contest this aspect of borrower's HBOR claim, the claim survived the MTD.

Intrusion upon Seclusion Claim; Negligent Training & Supervision Claim Based on FDCPA/Rosenthal Violations

Inzerillo v. Green Tree Servicing, LLC, 2014 WL 6660534 (N.D. Cal. Nov. 24, 2014): Invasion of privacy by intrusion upon seclusion claims require borrowers to show: 1) "an [intentional] intrusion into a private place, conversation, or matter; 2) in a manner highly offensive to a reasonable person." Debt collectors can escape liability by asserting a qualified privilege, but this privilege is negated if the debt collector's actions are "beyond all reasonable bounds of decency." Here, servicer (and servicer's third party debt collector) contacted or attempted to contact the defaulting borrower 98 times over two months. Representatives threatened to change the locks, disturb the occupying tenant, and "personally see to it" that borrower's short sale application be denied and foreclosure completed. Representatives also contacted borrower's elderly parents about a dozen times, trying to ascertain borrower's whereabouts. The court found that a reasonable jury could determine that the high frequency of calls and nature of servicer's threats were "offensive" and extinguished any privilege pled by servicer. It therefore denied servicer's motion for partial summary judgment on *borrower's* intrusion upon seclusion claim, and denied its motion as it pertained to borrower's request for punitive damages. In analyzing the *parents'* claim, however, the court found that the couple ignored the majority of the calls utilizing caller-ID. Servicer had no way of knowing the couple was elderly or in poor health, so their physical conditions were irrelevant. Further, representatives made no threats to the couple, only asking about the location of their daughter. The court therefore granted servicer's motion for partial summary judgment on the parents' claim.

Servicers may be liable for "negligently hiring, supervising, or retaining . . . unfit employees." Here, borrower alleged servicer trained its employees to violate the federal Fair Debt Collection Practices Act and the California analogue, the Rosenthal Act. Specifically, servicer maintained a policy of instructing representatives to contact unauthorized third parties (here, borrower's parents and her tenant) even when servicer had borrower's current contact information. By contrast, the FDCPA and Rosenthal Act forbid debt collectors from contacting third parties *unless* the debt collector reasonably believes that person has current contact information of the debtor. Additionally, borrower pointed to testimony from servicer representatives claiming they were not familiar with the Rosenthal Act. The court found a genuine issue of material fact exists "as to whether [servicer] employees were trained in violation" of the FDCPA and Rosenthal Act, and denied servicer's motion for partial summary judgment. Borrower is free to seek punitive damages on this claim as well.

TRO Based on Dual Tracking Claim Dissolved, PI Denied

Lane v. Citimortgage, Inc., 2014 WL 6670648 (E.D. Cal. Nov. 21, 2014):[24] To win a preliminary injunction in a California federal court, a borrower must show, *inter alia*, at least serious questions going to the merits of her claim. Here, borrower based her PI motion on a dual tracking claim. If a servicer denies a borrower's modification application, it cannot proceed with foreclosure until the borrower's time to appeal the denial has passed or, if the borrower appeals the denial, until the servicer denies the appeal. CC § 2923.6(e). Here, servicer denied borrower's complete application, but miscalculated the property value and failed to include borrower's income. Borrower then appealed the denial. In her complaint, and at the TRO hearing, borrower claimed servicer had not yet denied her appeal, but instead planned to continue with foreclosure. At the time, the court found that borrower established a likelihood of success on the merits of her dual tracking claim: her complete application deserved dual tracking protections, she timely appealed the denial and received no response, and servicer may have denied her a modification based on incorrect information. In reality, servicer *had* denied borrower's appeal—almost a full month before borrower filed her *ex parte* TRO request—citing an inability to create affordable mortgage payments given program (it is unclear if it was the HAMP program) constraints. In short, servicer had not recorded an NOD or NTS, or conducted a sale, while borrower's modification application was originally pending, or while her appeal was pending. Further, the sale was ultimately postponed until more than 15 days after the appeal was denied, conforming to the statutory requirements of CC 2923.6(e)(2). There are no serious questions going to the merits of borrower's now failed dual tracking claim and the PI was denied.

[24] In the previous iteration of this case, the court granted a TRO, halting the foreclosure based on borrower's dual tracking claim. See *Lane v. Citimortgage*, 2014 WL 5036512 (E.D. Cal. Oct. 7, 2014) in our Case Compendium.

Borrowers' Counter Modification Offer Constitutes Rejection in HBOR Context; Using UCL "Unlawful" Prong to Bring SPOC Claim Fails for Lack of Standing;

Johnson v. PNC Mortg., 2014 WL 6629585 (N.D. Cal. Nov. 21, 2014): "A counteroffer normally . . . reject[s] the offer to which it responds." Under HBOR, borrowers have 14 days within which to accept a modification offer from servicer. If they do not accept it, a servicer may proceed with foreclosure after the expiration of the 14 days. CC 2923.6(c)(2). Here, servicer offered borrowers a modification with terms borrowers found difficult to accept. Rather than outright reject the offer, borrowers proposed continuing modification negotiations and alternative modification terms. Before the 14-day acceptance period expired, servicer rejected borrowers' counteroffer by rescinding its original modification offer. The court accepted servicer's argument that borrowers' counteroffer was actually a rejection of its original offer, and that rescinding the modification offer was therefore not a breach of any duty servicer may have owed borrowers. (Instead of bringing a direct dual tracking claim, borrowers based their negligence claim on this chain of events.) Citing the basic contract rule that a counteroffer is a rejection of the first offer, the court then stated: "The parties have not identified any authority suggesting that a different rule applies under HBOR." Borrowers did assert that, under HAMP rules, a servicer may not interpret a borrower's offer to continue negotiations as a rejection of any outstanding modification offer, but they offered no citation or authority for that assertion. The court granted servicer's MTD borrowers' negligence claim.

There are three possible prongs within a UCL claim: unlawful, unfair, and fraudulent. The unlawful prong bases a UCL violation on another actionable claim. To bring a claim under any of the UCL prongs, borrowers must assert economic damages caused directly by servicer's misconduct. Under HBOR, a borrower who requests information on foreclosure alternatives must be assigned a single-point-of-contact, or SPOC. Generally, the SPOC must help navigate the modification process for borrowers. Instead of bringing a SPOC claim directly, these borrowers used the UCL unlawful prong to try to recover damages for servicer's SPOC violations. Borrowers believed the constant rotation of uninformed and ineffective SPOCs led to servicer's mishandling of borrowers' appeal of their first modification denial, and borrowers' eventual acceptance of a worse modification, constituting economic damages. The court rejected borrowers' claim, however, for lack of UCL standing. Borrowers' first modification was denied and they lost their appeal, not because of any SPOC misdoings, but because they themselves rejected servicer's modification offer by making a counteroffer. Additionally, borrowers' claim that, had SPOCs performed their duties appropriately, their appeal *would* have been granted and they *would* have obtained the first modification, is speculative at best. Absent a direct link between a SPOC violation and actual economic damages, borrowers' UCL claim failed.

HBOR Attorney's Fees Available After PI, NOD Rescission, and Mooted Case

Pearson v. Green Tree Servicing, LLC, 2014 WL 6657506 (N.D. Cal. Nov. 21, 2014): "A court may award a prevailing borrower reasonable attorney's fees and costs in an action brought pursuant to [HBOR]. A borrower shall be deemed to have prevailed for purposes of this subdivision if the borrower obtained injunctive relief or was awarded damages pursuant to this section." CC § 2924.12(i). The statute does not distinguish between a preliminary injunction and a permanent injunction. Here, borrower brought dual tracking claims against her servicer and obtained a preliminary injunction to stop the impending foreclosure sale of her home. Servicer then voluntarily rescinded the dual tracked NOD and moved to dismiss the case. Citing *Higher Taste, Inc. v. City of Tacoma*, 717 F.3d 712 (9th Cir. 2013), borrower asserted that the case should nevertheless be kept open for a fee motion, as she prevailed in the action because she won injunctive relief and the servicer then rescinded the offending notice, mooting borrower's dual tracking claim. The court agreed, stating that the preliminary injunction based on borrower's likely success on the merits, taken together with a mooted case brought about by defendant's voluntary actions, provides borrower with a "prevailing party" status even without a final judgment. The court allowed borrower to move for attorney's fees and costs.

Servicing Transfer: Transferee Servicer's Refusal to Accept Mortgage Payments Provides Basis for Viable Contract Claims

Morales v. Nationstar, 2014 WL 6603166 (S.D. Cal. Nov. 19, 2014): To state a contract claim, borrowers must show: 1) a contract; 2) borrower's performance, or excused nonperformance; 3) servicer's breach; and 4) damages caused by servicer's breach. Here, borrower sent his servicer his usual monthly payment and received confirmation of receipt and that borrower was current on his loan. On the same day, he received notice that a new servicer would take over servicing of his mortgage, effective the following month, and that he should then send payments to the new servicer. Borrower did as instructed, but the new servicer refused to accept his payment, claiming the loan was five months delinquent. Transferee servicer never accepted borrower's claims that his loan was current and never accepted any offered payments. Borrower brought contract claims against transferee servicer, based on the deed of trust (DOT), claiming possible foreclosure, interest on arrears, improper late fees, damaged credit, and lost time and money spent remedying this problem, as damages. Servicer argued that nothing in the DOT explicitly requires servicer to accept payments made on a *current* loan, as it merely deals with accepting payments on a delinquent loan. While that may technically be true, the court rejected servicer's argument because "the entire [DOT] . . . presupposes that the lender must accept the borrower's timely mortgage payments on a loan that is current. . . . To find otherwise would frustrate the entire basis of the [DOT]" and would allow a servicer to arbitrarily plunge a borrower into default simply by refusing to accept payments, as servicer did here. The court therefore denied servicer's motion to dismiss borrower's contract, breach of the implied covenant of good faith and fair dealing, and UCL claims.

Diversity Jurisdiction: Contesting a Trustee's Nonmonetary Status

Raissian v. Quality Loan Serv. Corp., 2014 WL 6606802 (C.D. Cal. Nov. 19, 2014): A defendant may remove a state court action to federal court based on diversity jurisdiction if the amount in controversy exceeds $75,000 and the claim(s) arise between citizens of diverse (different) states. Diversity jurisdiction requires *complete* diversity between all opposing parties and the defendant bears the burden of showing that removal is proper. Here, a California citizen brought state-law HBOR claims against his servicer, a "citizen" of Utah, and the foreclosing trustee, a "citizen" of California. Servicer removed the case to federal court, claiming trustee's California citizenship should be ignored for diversity purposes under Cal. Civ. Code § 2924l, as it is a "nominal" defendant. Borrower moved to remand the case, claiming he was suing trustee for its misconduct, not simply as a "nominal" party. Specifically, trustee was involved in the recording of the NOD in violation of HBOR's pre-NOD outreach requirements, acting as the agent of servicer and loan beneficiary. Additionally, borrower sought monetary damages from trustee for this statutory violation. The court agreed with borrower: "[Trustee] cannot be deemed a nominal defendant because the Complaint clearly demonstrates it is not a mere stakeholder" . . . and that it "has a sufficient stake in the outcome of these proceedings." The court granted borrower's motion to remand the case to state court because borrower and trustee are non-diverse parties.

SPOC Claim: Servicer's Failure to Respond to Borrowers' Appeal and New Financial Information; Letters Threatening Foreclosure Do Not Constitute Dual Tracking

Arbib v. Nationstar Mortg., 2014 WL 6612414 (S.D. Cal. Nov. 19, 2014): "Upon request from a borrower who requests a foreclosure prevention alternative . . . servicer shall promptly establish a single point of contact and provide to the borrower one or more direct means of communication with the [SPOC].” CC 2923.7(a). A SPOC must communicate with the borrower about “the process by which a borrower may apply for an available foreclosure prevention alternative and the deadline for any required submissions,” and walk the borrower through the application process. Here, borrowers allege that after their modification application was denied, they contacted servicer to appeal that decision and to update their financial information. They specifically asked who they should submit their documents to. Servicer responded by simultaneously denying borrowers’ appeal and assigning them a SPOC, who has remained unresponsive to all of borrowers’ phone messages and faxes. Servicer argued that the SPOC need not respond to borrowers’ communications since their application and appeal were previously both denied and “there was nothing to communicate.” Borrowers conversely allege that because servicer did not consider their updated financial information in the appeal, their application was not yet “complete” and SPOC duties continued. Had a SPOC dutifully responded to borrowers’ letters and other communications, borrowers may have been able to submit whatever documents servicer needed to grant them a modification. The court found that borrowers had adequately pled SPOC violations and denied servicer’s MTD.

Servicers may not record an NOD or NTS, or conduct a foreclosure sale while a borrower’s complete, first lien loan modification application is pending. CC § 2923.6. Here, borrowers sought injunctive relief to prevent servicer from recording an NOD, as servicer threatened to do in various letters to borrowers. Servicer argued, and the court agreed, that because servicer had not *actually* recorded an NOD yet, borrowers have no viable dual tracking claim. Servicer’s MTD borrowers’ dual tracking claim was granted.

Diversity Jurisdiction: Contesting a Trustee's Nonmonetary Status

Natividad v. Ocwen Loan Servicing, 2014 WL 6611054 (E.D. Cal. Nov. 19, 2014): A defendant may remove a state action to federal court based on diversity jurisdiction if the amount in controversy exceeds $75,000 and the claim(s) arise between citizens of diverse (different) states. Diversity jurisdiction requires *complete* diversity between all opposing parties and the defendant bears the burden of showing that removal is proper. Here, a California citizen brought state HBOR and common law claims against his servicer, lender, and the foreclosing trustee. Trustee, a "citizen" of California, filed a Declaration of Nonmonetary Status (DNMS), claiming borrower had sued it "solely in its capacity as Trustee" and that, as a "nominal" party, its California citizenship should be ignored for diversity purposes, as allowed by Cal. Civ. Code § 2924l. All defendants then removed the case to federal court, asserting complete diversity. Borrower opposed the DNMS and moved to remand, arguing it sued Trustee for its misconduct, not simply as a "nominal" party. The court first evaluated how it should, as a federal court, interpret a state-law DNMS, deciding that a DNMS is a creature of state procedural, rather than substantive, law. And because federal courts are not bound to follow state procedural rules under the *Erie* Doctrine, the court decided to conduct an independent analysis of Trustee's nominal status, rather than accepting Trustee's own assertions in the DNMS. The court concluded that simply acting as a trustee does not render a particular trustee a nominal party. And here, borrower contends Trustee knew borrower had submitted a complete loan modification application to servicer *before* Trustee recorded the NOD. This dual tracking allegation overcomes Trustee's arguments that it is a nominal party and that it was joined specifically to overcome diversity. The court granted borrower's motion to remand the case to state court because borrower and Trustee are non-diverse parties.

Rejection of "Offset" Tender Exception; NMS Immunity in MTD Context; Pleading Intentional SPOC Violations; Viable CC 2924.10 Claim; Negligence Analysis under *Alvarez*; ECOA: Pleading Requirements for 30-day Determination Violation

Banks v. JP Morgan Chase, 2014 WL 6476139 (C.D. Cal. Nov. 19, 2014): Borrowers bringing equitable claims to prevent or unwind foreclosure sales must tender the amount due on their loan. There are several exceptions to this rule, including the very rare exception where a borrower brings "a counterclaim or setoff against the beneficiary." Here, borrower asserted this exception because she lost equity at the foreclosure sale, and could have sold the home for even more than it ultimately sold for, according to her opposition papers. The court found that borrower misapplied the offset exception. That exception arose in a case where borrowers counter-sued a creditor that refused to return borrowers' personal property (the value of which exceeded the amount of borrowers' default), which creditor agreed to return *before* borrowers defaulted. Even if the offset exception did "apply to claims that arise *after* default on a secured loan," as asserted here, borrower's complaint did not specify that her damages exceeded the amount due on her loan, an issue only addressed in her opposition briefing. The court struck borrower's claims for declaratory relief and to remove the cloud on title for failure to tender. "However, because all of [borrower's] causes of action seek damages in addition to equitable relief, no cause of action is stricken on this basis."

As long as the National Mortgage Settlement (NMS) is effective, a signatory who is NMS-compliant with respect to the individual borrower is not liable for various HBOR violations, including dual tracking. CC § 2924.12(g). In this case, borrower brought dual tracking and SPOC claims against her servicer, a NMS signatory. As a signatory, servicer argued borrower's claims should be dismissed because servicer was NMS-compliant. Like other federal courts have ruled on this issue, this court found this safe harbor argument an affirmative defense more properly asserted at the summary judgment stage, not in a MTD. The court nevertheless walked through a brief analysis, finding that to "overcome this defense on motion to dismiss, a [borrower] must, at most, allege behavior that violates the [NMS] in her pleadings, although she need not mention the [NMS] Consent Decree itself." The court found that borrower's SPOC assertions adequately overcame servicer's affirmative defense for MTD purposes and refused to grant servicer's MTD on this basis.

Servicers may not move forward with foreclosure while a borrower's first lien loan modification application is pending. This dual tracking restriction also applies to a borrower's subsequent modification applications, if borrower "documented" and "submitted" a material change in their financial circumstances to their servicer. CC 2923.6(g). Here, borrower submitted four applications to servicer, which were all denied or unacknowledged. With her fifth application, borrower documented an income increase of $8,000 per month. Servicer, however, refused to postpone the pending foreclosure sale and has not provided borrower with a determination on this fifth application. The court agreed that this adequately states a dual tracking claim, rejecting servicer's argument that borrower failed to allege that the application was complete, was received by servicer, the pertinent dates, or the specific reasons behind the $8,000 increase.

"Upon request from a borrower who requests a foreclosure prevention alternative . . . servicer shall promptly establish a single point of contact and provide to the borrower one or more direct means of communication with the [SPOC]." CC 2923.7(a). A SPOC must communicate with the borrower about "the process by which a borrower may apply for an available foreclosure prevention alternative and the deadline for any required submissions," and walk the borrower through the application process. Here, borrower alleged her servicer changed her SPOC multiple times over many months and multiple applications, constituting a "sophisticated shell game designed to fatigue [borrower]." Further, none of the SPOCs informed her of relevant deadlines or which documents were missing. The court found these allegations enough for a viable SPOC claim. It also rejected servicer's argument that the SPOC claim fails because borrower did not allege actual economic damages, pointing to statute language providing for statutory damages for a servicer's "intentional," "reckless," or "willful misconduct." Because borrower alleged servicer's SPOC violations were intentional, her claim survived.

HBOR also requires servicers to acknowledge a borrower's modification application within five business days of receipt, to describe the loan modification process, and to request any missing documents. CC § 2924.10. Here, borrower alleged servicer never acknowledged her applications and that this failure led to improper denials. Specifically, servicer did not timely notify borrower it required utility bills to confirm her residence and later cited borrower's failure to provide these bills as the cause of her application denial. And, like borrower's SPOC claim, her assertion that this practice was intentional allowed her claim to survive the pleading stage even without alleging actual economic damages.

Negligence claims require servicers to owe borrowers a duty of care, which servicer then breaches. This court considered the most recent negligence jurisprudence in state and federal court and concluded:

> Taken together, these cases establish that traditional money-lending activity does not create a duty of care (*Nymark*), and that loan modification is generally deemed a traditional money-lending activity (*Lueras*). They also support the conclusion that servicer conduct during the modification negotiation process may create a special relationship and a resulting duty of care (*Alvarez*).

Here, borrower alleged servicer solicited her HAMP modification application knowing full well that the amount of borrower's outstanding loan obligation disqualified her from HAMP. She alleged servicer then solicited four additional applications, mishandling or losing all of them. On a MTD, "these solicitations are sufficient to allege that [servicer] had a duty to exercise due care in the processing of [borrower's] applications." Borrower also adequately alleged damages in late fees and ruined credit. The court therefore denied servicer's MTD borrower's negligence claim.

The Equal Credit Opportunity Act (ECOA) requires lenders to provide credit applicants with a determination within 30 days of receiving applicant's request. 15 U.S.C. § 1691(d)(1). The lender must also explain reasons for any adverse actions against the applicant. 15 U.S.C. § 1691(d)(2). This second requirement only applies if the applicant is *not* in default. Both requirements are triggered only if a borrower can allege he or she is a member of a protected class. Here, defaulting borrower alleged servicer failed to give her a timely determination on any of her modification applications and never provided reasons for its untimely denials. The court found that borrower's admitted default forestalled her 1691(d)(2) claim. The court also addressed servicer's argument that loan *modifications*, not completely new loans, are not "credit applications" under ECOA. This court seemed to agree with Seventh Circuit precedent treating modification applications as "extension[s] of credit" and borrowers applying for modifications as eligible for ECOA protection. Next, the court disagreed with servicer that borrower had to plead she was HAMP-eligible to bring a valid ECOA claim under 1691(d)(1). Borrower did, however have to plead that her application was "complete" under ECOA, which she did, alleging that servicer's requests for additional documents were erroneous and improper. Lastly—and this is where borrower's ECOA claim ultimately failed—the court found that borrower had not pled she was a member of a protected class and eligible for ECOA protection. The court dismissed her ECOA claim with leave to amend to allege she is a member of an ECOA-eligible protected class.

Various Claims Arising from Chapter 13 Bankruptcy, TPP, and BK Plan Completion

Sokoloski v. PNC Mortg., 2014 WL 6473810 (E.D. Cal. Nov. 18, 2014): Chapter 13 debtors repay their creditors according to a bankruptcy plan. "[A]fter completion by the debtor of all payments under the plan . . . the court shall grant the debtor a discharge of all debts provided for by the plan." 11 U.S.C. § 1328(a). Here, debtors made timely monthly payments according to their BK plan, which went toward their outstanding mortgage arrearage and fees, as well as their regular mortgage payment. Mid-plan, debtors' servicer offered them a Trial Period Plan (TPP), which reduced debtors' monthly payments. Debtors accepted the TPP and the BK trustee began making the reduced payments. Debtors, however, continued to pay the original plan's monthly payment—on top of the reduced TPP payment—because they wanted to quickly extinguish their outstanding debt, which they did, paying off their arrearage and completing their plan early. And although debtors successfully made every TPP payment, and continued to do so even after their BK plan was completed, they never received a permanent modification offer. The BK trustee eventually executed a Notice of Final Cure Payment, which servicer never responded to; nor did it object to the trustee's final BK report. The BK court found debtors' payments completed and adopted the trustee's accounting, which showed debtors had paid off their arrearage. Because debtors failed to attend financial management training, however, the BK court issued an Order to Close Chapter 13 Case Without Discharge. Post-BK, servicer instructed debtors to resume their previous mortgage payments—rather than their TPP payments—which debtors successfully did, until servicer refused to accept payments. Instead, servicer claimed debtors had defaulted and that the BK trustee had mistakenly terminated the BK plan. Debtors brought affirmative claims against servicer, which argued generally that debtors' suit fails because they never obtained a formal chapter 13 discharge and therefore cannot "rely on the terms of their Chapter 13 plan." But, the court found, the BK Code does not require a discharge for plan completion or for debtors to use their plans to demonstrate a paid-off arrearage, as debtors did here. Debtors' claim that their mortgage was brought current is not contradicted by their failure to obtain a discharge, which was predicated only on their failure to attend classes. Moreover, a lack of a formal discharge does not relate to debtor's affirmative claims, which all relate to servicer's business practices. The court declined to dismiss any of debtors' claims based on servicer's claim that a formal discharge was required.

Breach of implied covenant of good faith and fair dealing claims require borrowers to show their servicer unfairly interfered with the borrower's right to see a contract fully performed. Borrowers' own breach is a defense to a good faith and fair dealing claim. Here, borrowers alleged servicer interfered with their ability to see the benefits of their deed of trust (DOT) by refusing to accept borrowers' timely mortgage payments. Borrowers paid off their arrearage and then timely made monthly mortgage payments, until servicer refused to accept those payments. Servicer argued borrowers never paid off their arrearage (see above) and are thus currently in breach of the DOT, extinguishing their claim. The court, though, accepted borrowers' assertions as true at the pleading stage and rejected servicer's argument. Servicer next argued that because the BK trustee continued to make reduced payments after the initial three TPP months had passed (see above), borrowers breached the DOT by not paying their full mortgage payments. The court again disagreed with servicer, examining the TPP language and finding that nothing in that agreement restricted lower payments to the initial three-month period. If anything, the language indicated that the TPP would last *until* a permanent modification was put in place. The court denied servicer's MTD borrowers' good faith and fair dealing claim.

There are three possible prongs within a UCL claim: unlawful, unfair, and fraudulent. The unlawful prong bases a UCL violation on another actionable claim. Under the bankruptcy code, creditors must respond to final cure notices by notifying the debtor and the BK trustee whether it agrees that debtors have cured their default and if the debtor is current on payments to creditor. Basically, this is the creditor's opportunity to contest that the debt has been paid, and to flag any outstanding payments. *See* F.R.B.P. 3002.1(g). Here, servicer did not respond to the BK trustee's filing of the Notice of Final Cure Payment (NFCP) (see full explanation above). Debtors then brought a UCL unlawful prong claim based on servicer's failure to respond to the NFCP. The court agreed that servicer's conduct—failing to respond and then claiming debtors had not satisfied their arrearage—constitutes unlawful conduct. The court even speculated: "[Servicer's] violation of Rule 3002.1(g) may not only serve as a basis for a UCL claim, but also would have permitted [debtors] to reopen their chapter 13 case to seek sanctions [against servicer].” The court also found debtors to have adequately pled damages in additional “foreclosure fees” which servicer improperly tacked on to the loan balance because debtors should never have been placed in foreclosure. Debtors’ UCL claim survived.

Negligence claims require a duty of care owed from servicer to borrower. Generally, banks owe no duty to borrowers within a typical lender-borrower relationship. Here, the court found servicer’s offer of a permanent modification, through the TPP, created a duty of care. The court also found it important that servicer’s refusal to grant a modification occurred “well after [borrowers’] obligations to make payments through the Chapter 13 plan had terminated.” Relying mostly on *Jolly* (and curiously not mentioning *Alvarez*), the court denied servicer’s motion to dismiss borrowers’ negligence claim.

The California Rosenthal Fair Debt Collection Practices Act (RFDCPA) prohibits unfair and deceptive debt collection practices. Generally, courts have refused to consider foreclosure activities “debt collection” under the Act. Here, borrowers alleged servicer improperly considered them in default after they successfully paid off their arrearage as part of their bankruptcy plan. Servicer then charged them “foreclosure fees,” resulting in a “false representation of the character, amount, or legal status” of their mortgage debt. The court found this allegation sufficient to state a RFDCPA claim. Borrowers’ allegations relate to servicer’s negligent *servicing* of their loan, not actual foreclosure activity. Additionally, misrepresenting the loan amount, while not explicitly prohibited by the RFDCPA, is prohibited by its federal analogue, the Fair Debt Collection Practices Act, which the RFDCPA incorporates. Borrower’s RFDCPA claim therefore survived the MTD.

Borrowers Not Judicially Estopped from Suing Servicer Post-BK; Servicer's Failure to Reduce Payments According to Verbal Mod Agreement Basis for Contract Claims

Moreno v. Wells Fargo Home Mortg., 2014 WL 5934722 (E.D. Cal. Nov. 12, 2014): Debtors who fail to list current or potential litigation in their bankruptcy schedules will be judicially estopped from bringing claims subsequent to their bankruptcy discharge. Here, servicer told borrowers they would not qualify for a loan modification until they reduced their total debt burden. Consequently, borrowers filed chapter 7 bankruptcy, from which they successfully emerged with greatly reduced debt. Borrowers then contacted their servicer to apply for a modification, but were told that the bankruptcy prevented servicer from offering any modification or loan assistance. "Thus, it was not until the discharge of the debt and [servicer's] alleged decision not to provide [borrowers] with a loan modification 'that [borrowers] realized [servicer] had no intention of providing them with assistance.'" There was no potential for a lawsuit, then, when borrowers entered their bankruptcy, or at any point during the bankruptcy. The court refused to dismiss borrowers' complaint based on judicial estoppel.

Breach of contract claims require: (1) the existence of a contract; (2) borrower's performance or excused non-performance; (3) servicer's breach; and (4) borrower's resultant damages. Here, borrowers alleged servicer orally entered into a permanent modification agreement with borrowers—in exchange for borrowers' one-time lump sum payment—that reduced their principal and monthly mortgage payments and forgave their arrearage. Borrowers "performed" under the agreement by making the lump sum payment and because servicer then automatically withdrew monthly payments from borrowers' bank account, under the agreement. Servicer breached the modification, however, because it never reduced borrowers' payments, their principal, or forgave the arrearage. Borrowers' damages consisted of the lump sum payment. The court found a viable contract and good faith and fair dealing claims and denied servicer's MTD.

NOD Declaration Insufficient to Allege Compliance with Every Aspect of CC 2923.55; SPOC Pleading Requirements; Harm Not Required for CC 2924.17 Claim; CC 2924(a)(6) Claim Based on Improper Chain of Title Premature if Brought Pre-Sale; UCL Standing

Rahbarian v. JP Morgan Chase, 2014 WL 5823103 (E.D. Cal. Nov. 10, 2014): Under HBOR, servicers are now required to not only contact (or attempt to contact) borrowers before recording an NOD, as they were required to do pre-HBOR, but they must also provide borrowers with a statement that borrowers may request "certain information, including copies of the promissory note, the deed of trust, any assignment . . . demonstrating the right of the mortgage servicer to foreclose, and the borrower's payment history." CC § 2923.55(b). Here, servicer recorded an NOD and the companion NOD declaration of compliance with CC 2923.55, which did *not* include a copy of any statement provided to borrowers explaining their ability to request certain loan information. Nor did the declaration assert that this information had been communicated to borrowers. Further, borrower insisted he never received this required information. The court found that the current CC 2923.55 can only be fulfilled if the servicer provides borrowers with a writing containing the "proper information," and that a recorded NOD declaration is insufficient proof of compliance with this requirement. This contrasts to the former CC 2923.5, to which a servicer could demonstrate compliance by pointing to a judicially noticed NOD declaration. The court accepted borrower's assertions that the required information was never provided to him and denied servicer's motion to dismiss borrower's pre-NOD outreach claim.

"Upon request from a borrower who requests a foreclosure prevention alternative . . . servicer shall promptly establish a single point of contact and provide to the borrower one or more direct means of communication with the [SPOC]." CC 2923.7(a). A SPOC may be a single person, or a team of people, but must have access to the requisite information to effectively communicate with the borrower about their application and their loan. "The single point of contact shall remain assigned to the borrower's account until the mortgage servicer determines that all loss mitigation options offered by, or through, the mortgage servicer have been exhausted or the borrower's account becomes current." Here, borrower alleged servicer shuffled borrower between multiple points of contact. Without more, the court found borrower's claim insufficient and granted servicer's MTD, but also granted borrower leave to amend. Specifically, the court wants to know who the multiple contacts were, how many people borrower had contact with, and/or the underlying circumstances and timing of the SPOC reassignments.

One of the most well-known aspects of HBOR is its "robo-signing" statute, CC 2924.17. Specifically, section (b) requires a servicer to "ensure that it has reviewed competent and reliable evidence to substantiate . . . [its] right to foreclose." But the lesser-known section (a) also mandates that foreclosure documents, including assignments of the loan, be "accurate and complete and supported by competent and reliable evidence." Here, borrower alleged that the assignment of the DOT was "robosigned" because a trustee employee signed the document, falsely purporting to be beneficiary's employee. Servicer argued that borrower's claim fails, even if his allegations were true, because he had not alleged harm stemming from the purported robosigning. The court looked to the plain language of the operative, relief-granting statute, CC 2924.12(a), and found that borrowers need not demonstrate harm or injury to bring viable robosigning claims under HBOR, as they had to pre-HBOR. Accordingly, the court refused to grant servicer's MTD on that basis. The court did, however, agree with servicer that borrower's allegations were conclusory and lacked factual support. Borrower did not, for instance, allege that the beneficiary's employee lacked authority to sign on behalf of the trustee, "nor that she failed to conduct the due diligence required by section 2924.17." The claim was dismissed, but borrower was granted leave to amend.

CC 2924(a)(6) restricts "the authority to foreclose" to the beneficiary under the DOT, the original or properly substituted trustee, or a designated agent of the beneficiary. This HBOR addition codified the "authority to foreclose" requirement that existed pre-HBOR and basically gives borrowers a statutory basis for wrongful foreclosure claims. Here, borrower brought his CC 2924(a)(6)/wrongful foreclosure claim after the NOD was recorded, but before any sale. Though some courts allow pre-sale wrongful foreclosure claims, few have done so where the basis of borrower's claim is a defect in the chain of title, as borrower alleged here with his robosigned assignment allegations. The court therefore dismissed borrower's wrongful foreclosure claim as premature.

Under California's Unfair Competition Law (UCL), a plaintiff must demonstrate: 1) an injury in fact (lost money or property); 2) caused by the unfair competition. Cal. Bus. & Prof. Code § 17204. Borrower met the first prong by showing that the imminent loss of his home constitutes injury. Borrower failed the second prong because he failed to demonstrate that it was *servicer's misconduct* that caused his injury. Rather, the court found that borrower's default "triggered" the foreclosure process and dismissed his UCL claims.

Dual Tracking: Servicer's Failure to Identify Missing Documents Infers Complete Application; Pleading SPOC Related Damages

Contreras v. JP Morgan Chase Bank, 2014 WL 5786244 (C.D. Cal. Nov. 6, 2014):[25] Servicers may not move forward with foreclosure while a borrower's complete, first lien loan modification application is pending. CC § 2923.6. A servicer determines what a "complete" application constitutes. *See* CC § 2923.6(h). Servicers must respond to *any* submitted application documents within five business days to inform the borrower that the servicer received the application and which, if any, documents are missing. CC § 2924.10. Here, borrower

[25] Previously, the court denied servicer's MTD borrowers' breach of contract claim, based on servicer's failure to provide a contractually required pre-acceleration notice. See *Contreras v. JP Morgan Chase*, 2014 WL 4247732 (C.D. Cal. Aug. 28, 2014) in our Case Compendium. In the present case, the court again denied servicer's MTD borrowers' contract claim for reasons similar to those explained in the previous decision and not summarized here.

alleged he submitted a complete application but that before servicer denied that application, it conducted the foreclosure sale. Servicer argued it should not be liable for this dual tracking violation because borrower's application was not "complete," as defined by servicer. The court, however, read the "complete" requirement "in conjunction with [CC] 2924.10," pointing out that servicer was over a month late in acknowledging borrower's application, and its acknowledgement letter failed to inform borrower of any missing documents. The court therefore *inferred* that borrower submitted a complete loan modification because servicer failed to identify any missing documents. Essentially, the court found, that "to comply with HBOR, the servicer must tell the borrower how to complete a deficient application." The court denied servicer's motion to dismiss borrower's dual tracking claim.

Borrowers may recover post-foreclosure damages for a servicer's HBOR violations. CC 2924.12. Borrowers who request foreclosure alternatives must be assigned a SPOC to walk them through the application process. Here, borrower alleged he never received a written notice of his pending application and that the sale occurred while his application was pending. These two allegations demonstrate that either a SPOC was never assigned, as borrower also alleged, or that a SPOC did not perform its statutory functions correctly. Importantly, borrower alleged that he "lost the right to [his] property," spent resources in retaining an attorney, and incurred emotional distress damages. The court found borrower to have sufficiently pled damages related to servicer's SPOC violation and denied servicer's MTD.

Recent Regulatory Updates

Fannie Mae Servicing Guide Announcement SVC-2014-20 (Nov. 12, 2014)

Fannie Mae has released a new *Servicing Guide*, replacing its 2012 *Servicing Guide* and incorporating all Fannie Mae Servicing Guide Announcements made from September 2, 2011 through October 17, 2014. Notably, Fannie Mae has replaced the word “should” with “must” where appropriate, ordering servicers to implement certain policies or procedures, rather than merely encouraging them to do so.